No. 12–16562

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL WAYNE COOK,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
No. CV–97–00146–RCB

RESPONDENTS–APPELLEES' ANSWERING BRIEF

Thomas C. Horne
Attorney General
(Firm State Bar No. 14000)

Kent E. Cattani
Division Chief Counsel
Criminal Appeals/Capital Litigation Division
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
kent.cattani@azag.gov
cadocket@azag.gov
State Bar Number 010806

Attorneys for Respondents-Appellees

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STATEMENT OF JURISDICTION

On July 12, 2012, the United States District Court for the District of Arizona denied Cook's motion for relief from judgment. ER 003. Cook filed a timely notice of appeal, and this Court has jurisdiction under 28 U.S.C. § 1291.

QUESTION PRESENTED FOR REVIEW

Cook's federal habeas proceedings concluded in January 2009. Did the District Court abuse its discretion by rejecting Cook's assertion that he is entitled to reopen his case and obtain relief based on the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)?

STATEMENT OF THE CASE

Cook is on death row in Arizona for two 1987 murders. *State v. Cook*, 821 P.2d 731, 738 (Ariz. 1992). Cook and his roommate John Matzke tortured, sodomized, and killed Carlos Cruz Ramos and Kevin Swaney in Cook and Matzke's apartment in Lake Havasu City, Arizona. *Id.* at 736–37. The torture included burning one of the victims with a cigarette and stapling his foreskin to a chair. *Id.* When Matzke reported the murders to the police, officers went to the apartment, advised Cook of his *Miranda* rights, and then asked him why there were two dead bodies in the apartment. Cook replied, "we got to partying; things got out of hand; now two people are dead." When asked how they died, Cook said, "My roommate killed one and I killed the other." *Id.* at 737.

The procedural history of this case is set forth in the District Court's July 9, 2012, Order Denying Relief from Judgment. ER 003. *See also* Respondents' Response to Motion for Relief from Judgment, filed June 18, 2012.[1] With regard to Cook's claim that the Supreme Court's decision in *Martinez* warrants reopening his federal habeas proceeding to present additional

[1]Because this Court's July 12, 2012 Order indicated that the Court has read all district court filings and requested "abbreviated briefs" from the parties, Respondents will not submit excerpts of the record before the District Court unless directed to do so by this Court. Respondents have attached, however, a copy of one relevant state-court Order, dated January 27, 2011, as "Attachment A" to this Answering Brief.

argument regarding ineffective assistance of counsel for failing to develop mitigation evidence, the relevant facts include that Cook voluntarily chose to represent himself at trial and sentencing, and that he personally declined to present any evidence to the court at sentencing. *Cook*, 821 P.2d at 737-38.

Cook filed a petition for post-conviction relief in 1993, raising a claim that counsel was ineffective prior to Cook's decision to represent himself. *See Cook v. Schriro*, 538 F.3d 1000, 1012-13 (9th Cir. 2008). The state trial court conducted an evidentiary hearing in 1994, after which it denied Cook's claim as meritless.

Cook's post-conviction counsel did not raise this claim in Cook's petition for rehearing, so the claim was not considered as part of the petition for review he submitted to the Arizona Supreme Court. *Id.* at 1013. Accordingly, on federal habeas review, this claim was found to be procedurally barred. *Id.* at 1024–27.

After Cook's federal habeas proceedings concluded, he filed (in 2010) another petition for post-conviction relief. In that proceeding, the state court considered and rejected the merits of an expanded ineffective-assistance claim. *See* Attachment A, at 5–9. Cook specifically asserted in that proceeding that he only recently was diagnosed as suffering from post-traumatic stress disorder ("PTSD") and organic brain dysfunction and that this mitigation probably would

have resulted in a non-death sentence. The trial court (the same judge who sentenced Cook to death) denied relief, stating "unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic stress disorder at the time of the murders it still would have imposed the death penalty." *Id.* at 6. The court further noted that the subsequent PTSD diagnosis "simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing. Knowing that name and knowing the symptomology of that condition would not have changed the sentencing decision made by the Court." *Id.* at 7. Finally, the court observed that Cook had failed to diligently develop his PTSD evidence. *Id.* at 9.

SUMMARY OF ARGUMENT

The District Court properly applied the factors set forth in *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009), in determining that Cook has not established that extraordinary circumstances warrant reopening his federal habeas proceedings. The District Court also properly determined that, even assuming Cook was entitled to reopen his case for reconsideration regarding whether he can establish cause for his procedurally-defaulted ineffective-assistance claim, he would not be entitled to relief because the procedural default at issue in his case related to a failure to pursue *appellate* review of claims raised in post-conviction proceedings, and *Martinez* does not apply to

that type of ineffectiveness. Furthermore, the District Court also properly determined that, even assuming *Martinez* applies, Cook's claim fails because he has not demonstrated that his defaulted ineffectiveness claim is substantial.

ARGUMENT

In *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009), this Court set forth several factors to consider in determining whether a petitioner has established extraordinary circumstances warranting relief under Rule 60 based on an intervening change in the law. Those factors include: (1) whether "the intervening change in the law . . . overruled an otherwise settled legal precedent;" (2) whether the petitioner was diligent in pursuing the issue; (3) whether "the final judgment being challenged has caused one or more of the parties to change his position in reliance on that judgment;" (4) whether there is "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief;" (5) whether there is a "close connection" between the original and intervening decisions at issue in the Rule 60(b) motion; and (6) whether relief from judgment would upset the "delicate principles of comity governing the interaction between coordinate sovereign judicial systems." *Id.* at 1135–40.

Here, the District Court considered and correctly applied these factors in denying Cook relief under Rule 60. *See* July 9, 2012 Order, at 8–13. Significantly, the district court properly found that the "close connection"

factor" weighed against Cook because, unlike *Martinez*, in the present case, the procedural default of the ineffective-assistance-of-counsel claim at issue did not result from post-conviction counsel's failure to raise an ineffective-assistance-of-counsel claim in post-conviction proceedings, but rather from post-conviction counsel's failure to subsequently raise the asserted claims in a petition for rehearing following the denial of post-conviction relief. *Id.* at 11–12.

Additionally, the District Court correctly found that the "comity" factor weighs against Cook because the prior judgment finding Cook's ineffective-assistance-of-counsel claim precluded did not stop the district court and this Court from addressing the merits of Cook's claim that counsel was ineffective prior to Cook's decision to represent himself. Order, at 13. The District Court further noted that the state court held an evidentiary hearing and considered the merits of Cook's ineffective assistance of counsel claims prior to the commencement of federal habeas proceedings, and that the state court considered the merits of Cook's expanded sentencing ineffectiveness claim during Cook's third post-conviction proceeding. *Id.* This Court should affirm the district court's ruling that Cook has not established extraordinary circumstances warranting Rule 60 relief.

Cook asserts that "the State explicitly waived any argument that the factors of *Phelps* weighed against Cook's claim." Opening Brief, at 48.

However, in their Response to Cook's Rule 60 Motion, Respondents offered several alternative reasons for denying Cook's motion, including the primary reason relied on by the district court – that Cook failed to establish the existence of extraordinary circumstances justifying relief under Rule 60(b)(6) to reconsider the Court's procedural bar ruling. *See* Respondents Response, at 7.

Moreover, even if Respondents and/or the District Court overlooked or were incorrect about any point of law, this Court must follow the law and uphold a ruling that reached the right result, even if it were for the wrong reason. *See Gonzalez v. Arizona*, 624 F.3d 1162, 1203–04 fn.5 (9th Cir. 2010) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.") (quoting *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980)).

Finally, in addition to the reasons proffered by the district court for finding that Cook's ineffectiveness claim is not substantial, this Court can also reject Cook's claim on the basis that Cook represented himself at trial and sentencing. *See Faretta v. California*, 422 U.S. 806, 824 fn.46 (1975) ("Whatever else may or may not be open to him on appeal, a defendant who represents himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'").

Furthermore, Cook chose not to present mitigation at sentencing. Accordingly, assuming that his pre-trial counsel should have investigated information relating to possible avenues of mitigation (most of which involve facts known to Cook at the time of sentencing), his claim of ineffective assistance of pre-trial counsel is moot. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007). Thus, Cook cannot prove a "substantial" claim of ineffective assistance of counsel, and this Court should summarily reject Cook's request for relief. *See Leavitt v. Arave*, 682 F.3d 1138, [1-7] (9th Cir. 2012); *Sexton v. Cozner*, 679 F.3d 1150, 1159–61 (9th Cir. 2012) (holding that trial counsel was not ineffective; thus state habeas counsel could not have been ineffective for failing to raise post-conviction claims in Oregon courts); *Lopez v. Ryan*, 678 F.3d 1131, [3-4] (9th Cir. 2012) (finding no ineffective assistance by post-conviction counsel where claim of ineffective assistance at sentencing was not substantial).

CONCLUSION

This Court should uphold the decision of the district court denying Cook's motion for relief from judgment.

Respectfully Submitted,

Thomas C. Horne
Attorney General

s/Kent E. Cattani
Division Chief Counsel
Criminal Appeals/Capital Litigation Division

Attorneys for Respondents-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dale A. Baich
Robin C. Konrad
850 West Adams Street, Suite 201
Phoenix, Arizona 85007

Michael J. Meehan
3938 East Grant Road, No. 423
Tucson, Arizona 85712

Attorneys for Petitioner-Appellant

s/ L.L. Kugler
Legal Secretary
Criminal Appeals/
Capital Litigation Division
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

2793382

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32–1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 1,655 words.

s/ Kent E. Cattani
Division Chief Counsel

No. 12–16562

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

DATED this 20th day of July, 2012.

Respectfully Submitted,

Thomas C. Horne
Attorney General

s/Kent E. Cattani
Division Chief Counsel
Criminal Appeals/Capital Litigation Division

Attorneys for Respondents-Appellees

ATTACHMENT A

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE STEVEN F. CONN
DIVISION 3
DATE: JAN. 27, 2011

SC*
VIRLYNN TINNELL, CLERK

COURT NOTICE/ORDER/RULING

STATE OF ARIZONA,
Plaintiff,

vs.

DANIEL WAYNE COOK,
Defendant.

No. CR-9358

The Court has reviewed the Defendant's Third Petition for Post-Conviction Relief filed on November 23, 2010, the State's Response and the Defendant's Reply. The Court has reviewed the exhibits attached to the Defendant's Petition. The Defendant asserts that he is entitled to post-conviction relief because of newly discovered evidence which probably would have resulted in him not receiving the death penalty. The Defendant is not challenging his underlying conviction. That newly discovered evidence is his recent diagnosis with post-traumatic stress disorder which existed at the time of the crimes for which he was sentenced to death in this case. The Court assumes the validity of that diagnosis for purposes of this Order. The Defendant asserts that this evidence would have changed the sentence in 2 different respects. First, that the State would not have sought the death penalty. Second, that the Court would not have imposed the death penalty.

The State argues that the Defendant is precluded from the relief being sought and that the Petition should be summarily denied. Rule 32.1(e) provides that a defendant may seek post-conviction relief if newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Rule 32.2(a) provides that a defendant shall be precluded from

relief based upon any ground finally adjudicated on the merits on appeal or in any previous collateral proceeding or that has been waived at trial, on appeal or in any collateral proceeding. The grounds for preclusion are relevant because the Defendant in this case, following his jury trial and sentencing, has had a direct appeal and filed 2 previous petitions for post-conviction relief, in the latest of which he was represented by the same attorney representing him on the current proceeding. However, Rule 32.2(b) provides that Rule 32.2(a) does not apply to a claim for relief based on Rule 32.1(e), as is the claim in this case.

This does not mean that a claim for post-conviction relief based on newly discovered evidence can be made at any time without limitation. Rule 32.2(b) goes on to provide that when a claim of newly discovered evidence is to be raised in a successive or untimely post-conviction relief proceedings, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed. This case involves a petition, not a notice, which clearly sets forth the specific exception. The Court would still have the authority to summarily deny relief upon a determination that there are not meritorious reasons shown why the claim was not stated previously.

There are other procedural components to a claim of newly discovered evidence that invoke preclusion consideration. In order to show that newly discovered facts exist, a defendant must show that he exercised due diligence in securing the newly discovered facts. This means that there must be not only due diligence in discovering the facts that existed at, in this case, the time of sentencing but were unknown to the defendant but also due diligence in bringing them to the attention of the court. Unlike preclusion, which may require a simple review of the procedural history of the case, the issue of due diligence is more fact intensive. This case, of course, involves a claim of newly

discovered evidence that is being made more than 22 years after the relevant time in question, although the Court is aware of no bright line rule suggesting that there is some time frame beyond which one is presumed to no longer be acting with due diligence.

To justify relief under Rule 32.1(e) the facts must not be merely newly discovered but they must be material, meaning that they probably would have changed the sentence. The Defendant first asserts that his newly discovered diagnosis of post-traumatic stress disorder, if known to the State back in 1987, would have caused them to not seek the death penalty. This assertion is supported by an affidavit from the prosecutor in this case, Eric Larsen, indicating that he would not have sought the death penalty for the Defendant had he known the information contained in the exhibits attached to the most recent Petition.

The Court queries initially whether the exercise of prosecutorial discretion in deciding what charges to file and sentence to seek is a proper subject for inquiry under Rule 32.1(e). It seems that this form of relief is intended to address the discovery of facts relating to a case or a defendant's background which, if presented to the trier of fact or the sentencing entity, would have resulted in a different verdict or sentence. The Court acknowledges that it can identify no language in Rule 32.1(e) that would preclude this sort of claim, but it seems to the Court that this is not the scenario contemplated as a basis for relief under the rule. It strikes the Court as the ultimate in speculation to suggest that a defendant should get post-conviction relief for newly discovered evidence based on the assertion of a prosecutor 23 years after the fact that he would have made a different charging decision.

This is more apparent upon considering the specific circumstances involved in this case. The Court should preface its comments by noting that it had a great deal of respect for Mr. Larsen when he was a prosecutor for the Mohave County Attorney's Office and that that respect was not diminished in any way by him becoming a criminal defense attorney, although the Court can think

of only one case in which it has dealt with him in the latter capacity. That case was, ironically, also a Rule 32 case in which he testified as an expert witness for the defense in support of a claim of ineffective assistance of counsel.

The Court makes this observation not to suggest that Mr. Larsen is some hired gun whose services are available wherever a Rule 32 needs to be saved. To the extent that Mr. Larsen's opinion is relevant, the question is not what the Eric Larsen of today, having practiced criminal defense for at least the last 15 years, would do in a case involving identical facts if he were somehow to be appointed as a special prosecutor in a potential capital case. The question is what the prosecutor Eric Larsen would have done back in 1987 and 1988 without the benefit of the experience of criminal defense work, including defense of capital cases, to broaden his horizons and perspectives.

The Court would like to avoid getting into a discussion of personalities in this Order and recognizes that a determination of credibility based solely upon affidavits is improper, unless perhaps an affidavit is inherently incredible on its face. The Court recalls, however, that Mr. Larsen was an aggressive prosecutor and that there were times when he and the Court clashed as to how the Court handled this case. The Court also recalls an unrelated case prosecuted around this same time by Mr. Larsen in which a defendant claimed that his sentence should be mitigated by a diagnosis of post-traumatic stress disorder. The Court recalls that Mr. Larsen, who had served in the military, indicated that many military personnel, presumably including himself, did not necessarily believe in the viability of post-traumatic stress disorder as a psychiatric diagnosis and that it should not be treated as a relevant consideration in sentencing.

The Court acknowledges that it is skating on thin procedural ice by making these comments because it may seem to be deciding issues of credibility based on affidavits rather than sworn testimony subject to cross-examination. The Court is engaging in this analysis mainly to point out the problems inherent in trying to determine how a prosecutor would have exercised his discretion

23 years ago with the added knowledge of a diagnosis of post-traumatic stress disorder but without the added experience and perspective he undoubtedly gained in the ensuing years.

The Court is also aware that in 1987 and 1988, long before the Ring decision changed the landscape of capital sentencing, the Mohave County Attorney's Office sought the death penalty on a fairly regular basis. This was a case involving the torture, mutilation and eventually killing of 2 completely innocent victims who had the misfortune of working with and knowing the Defendant and the co-defendant in this case. It is unfathomable to the Court that the Mohave County Attorney's Office during the time that this case was pending would not have sought the death penalty even for a defendant who was known to have been diagnosed with post-traumatic stress disorder.

The Court finds that the affidavit from the former prosecutor of this case is speculation and conjecture. The Court determines that a claim that a different charging decision or sentencing request would have been made is not the difference in the verdict or sentence contemplated by Rule 32.1(e). The Court determines that the Defendant is not entitled to relief for newly discovered evidence based on the affidavit of Mr. Larsen.

The second basis for relief is that the Defendant would not have received the death penalty if his diagnosis with post-traumatic stress disorder had been known at the time of sentencing. Again, it has to be emphasized that the issue is what would have happened in 1988. The question is not what a post-Ring jury would do today at a significantly different procedure where the Defendant was presented by an attorney at a 3-part trial where all significant decisions would be made by the jury. The question is not even what this Court, whose thoughts about the application and efficacy of the death penalty have evolved considerably over the years, would do today if granted a Ring exemption and allowed to make a decision whether the Defendant should be sentenced to death. The question is whether this Court in 1988 would have made any different decision under the judicial sentencing

scheme in effect at the time had it known of the diagnosis of post-traumatic stress disorder in addition to everything else that it knew regarding the Defendant's mental health history.

This is not a case where the Court has to speculate about whether new evidence might have caused a jury to reach a not guilty verdict had they known of such evidence. This is not a case where the Court has to speculate about whether new evidence might have caused a jury to not recommend a death sentence had they known of such evidence. Only the Court knows for sure what it would have done, and the only speculation involved is in the process of remembering the judicial officer that it was 22 years ago.

The Court certainly recognizes the problems inherent in this analysis. Counsel may have a legitimate concern that the Court can say whatever it wants in an Order, without testifying under oath, being cross-examined or subjected to impeachment. The fact remains that this Court has had to make similar decisions in countless Rule 32 proceedings in which claims were made that different circumstances, usually involving more effective representation, would have resulted in different sentences being imposed. The fact that this is a death penalty case does not change the process, it just heightens the significance of the process. The Court determines unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic stress disorder at the time of the murders it still would have imposed the death penalty.

The State feels compelled to discuss the Bilke decision cited by both counsel, because it may suggest that an evidentiary hearing would have to be set under these circumstances. The Court does not believe that Bilke stands for the proposition that every post-sentencing diagnosis of post-traumatic stress disorder requires an evidentiary hearing or resentencing. As pointed out in Bilke, post-traumatic stress disorder was not even a recognized mental condition at the time the defendant in that case was sentenced. The diagnosis was not only new to that defendant but it was new to the medical profession. The diagnosis was an accepted one by the time of the sentencing in this case

and the cases cited in Bilke had been reported prior to the sentencing of the Defendant. The defendant in Bilke raised this issue in what may have been his first request for post-conviction relief 13 years after being sentenced rather than in his third such request 22 years after being sentenced, although that fact is probably of little relevance. More critical to the Court's consideration is that it cannot be ascertained from the Bilke decision whether the trial judge engaged in any analysis similar to what the Court is attempting to do in this Order. The decision lays out in specific detail the documentation that was presented to the trial court but indicates only that the trial court "denied the PCR without an evidentiary hearing." It is unknown to this Court, and cannot be determined from the appellate opinion, whether the Rule 32 judge was the same as the trial judge and, if so, whether his denial of post-conviction relief was done summarily without further discussion or whether it was based on the same judge in both phases of the proceedings having decided that the recent diagnosis would not have changed the decision that he had made years earlier. The Court determines that the Bilke decision does not by itself mandate a Rule 32 evidentiary hearing in this case.

The Court concludes for all the above reasons that the subsequent diagnosis of post-traumatic stress disorder simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing. Knowing that name and knowing the symptomology of that condition would not have changed the sentencing decision made by the Court. The recent diagnosis is not material under Rule 32.1(e) because it would not have probably resulted in a different sentence being imposed by this Court.

Despite the determination that the diagnosis of post-traumatic stress disorder is not a material fact that has been newly discovered, the Court still addresses the issue of due diligence. Doing so is not meant to undermine that finding but to make as full a record as possible on the basis for the Court's ultimate ruling. Although a claim of newly discovered evidence is not subject to preclusion in the strictest sense, Rule 32.1(e)(2) requires due diligence and Rule 32.2(b) requires an explanation

for not raising a claim in a previous petition. In assessing due diligence the Defendant is held accountable for decisions made on his behalf by previous attorneys representing him and made by himself while representing himself.

The procedural history of the phases of this case at which the Defendant's mental health was discussed and assessed have been noted in the pleadings, can be determined from the record and will not be reiterated at this time. The concern the Court has with regard to the issue of due diligence is that the Defendant has had 2 previous Rule 32 proceedings in which this issue could have been raised. Certainly the first proceeding, initiated within a relatively short time after the trial proceedings and direct appeal, would have been the logical time to address this issue. Although the Defendant had obviously not yet then been diagnosed with post-traumatic stress disorder, that proceeding would have at least provided an avenue for requesting a further mental health examination of the Defendant, a request which could have been made by an attorney better able than the Defendant was during the trial proceedings to articulate the reasons for such an examination. The Court is aware that the Defendant has relatively recently suggested that he was denied effective assistance of counsel in that first Rule 32 proceeding, a claim which he did not formally make in the state proceedings for more than 10 years, but the Court has determined in ruling on his second petition that such a claim would not be one he could raise.

To a lesser extent the Court is also concerned that this issue was not developed in the second Rule 32 proceeding in which the Defendant was represented by the same attorney who represents him now. The Court concedes that this is a far less compelling argument as it relates to the issue of due diligence. The issue of the Defendant's mental health was raised in the second Rule 32 proceeding, so perhaps an attempt could have been made at that time to obtain further information regarding his mental health. The Court concedes that this observation may seem disingenuous since it actually ruled that this claim, that the Court improperly allowed the Defendant to represent himself

at trial and sentencing while he was mentally ill, was precluded. It is unlikely that the Court would have granted funds for an examination of the Defendant under those circumstances even if it had been requested.

The Court's main concern is that the diagnosis of post-traumatic stress disorder has been raised for the first time 23 years after the crimes for which he was sentenced and on the eve of the Arizona Supreme Court being asked to issue an execution warrant. Although the Court finds that the Defendant's present counsel has shown due diligence in raising this issue once the diagnosis was made, the Court determines that the Defendant and his attorneys at various stages of the proceedings in this case have not shown due diligence in securing that diagnosis. Even if the Court were to find that the Defendant's diagnosis of post-traumatic stress disorder were a material fact which probably would have changed the sentence imposed, which it has not, the Court would find that the Defendant did not exercise due diligence in securing that information and would not be entitled to relief on a claim of newly discovered evidence.

The Court's focus in this Order thusfar has been the claim of newly discovered evidence. This is consistent with the pleadings that have been filed. Although little attention is devoted to any other issue, the Defendant has also claimed that he is entitled to relief under Rule 32.1(h). This would require the Defendant to show by clear and convincing evidence that the recent diagnosis of post-traumatic stress disorder would be sufficient to establish that the court would not have imposed the death penalty. Although under the circumstances of this case it is hard to separate this claim from the claim of newly discovered evidence, the claim of "actual innocence" is different in that it lacks the component of due diligence. However, the Court's determination that it still would have imposed the death penalty had it known that the Defendant had post-traumatic stress disorder in effect constitutes a ruling on the claim under Rule 32.1(h).

IT IS ORDERED denying the Defendant's Third Petition for Post-Conviction Relief.

cc:

Mohave County Attorney*

Michael J. Meehan
333 N. Wilmot, Suite 300
Tucson, AZ 85711
Attorney for Defendant

Arizona Supreme Court
1501 W. Washington, Suite 402
Phoenix, A Z 85007-3329

Arizona Attorney General
Criminal Division
1275 W. Washington
Phoenix, AZ 85007

Honorable Steven F. Conn*
Division 3